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No. 97-14

In the Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether political subdivisions of the State of Michigan may impose *ad valorem* taxes on land that was once patented in fee pursuant to the Treaty of Oct. 18, 1864 between the United States and the Chippewa Indians, 14 Stat. 657, but that has since been repurchased by the Tribe or individual tribal members.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-10a) is reported at 106 F.3d 130. The memorandum opinion and order of the district court (Pet. App. 11a-45a) are reported at 882 F. Supp. 659.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1997. A petition for rehearing was denied on March 31, 1997. Pet. App 1a. The petition for a writ of certiorari was filed on June 30, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Prior to 1855, the bands composing the Saginaw Chippewa Tribe entered into several treaties with the United States under which the bands ceded vast portions of their aboriginal lands within the present-day State of Michigan. The bands consisted of the Saginaw, Swan Creek, and Black River Chippewa Indians. On August 2, 1855, the bands and the United States entered into a treaty, Treaty with the Chippewas, 11 Stat. 633, which set aside two locations for the bands' reservations. Pet. App. 13a-14a. The reservation relevant to this case consisted of a tract of six contiguous townships in Isabella County, Michigan (the Isabella Reservation).

On October 18, 1864, the Saginaw Chippewa Indians entered into their final treaty with the United States. Treaty with the Chippewa Indians (Treaty of 1864), 14 Stat. 657. The land allotment scheme under the 1864 Treaty provided for the issuance of two types of patents to lands selected by the Saginaw Chippewa Indians.[1] Under Article 3 of that Treaty, the Department of the Interior's Office of Indian Affairs was to issue unrestricted fee patents to the lands selected by those Indians identified as "competent" by the local agent, Pet. App. 61a, and was to issue restricted patents to those Indians identified as "not so competent," *id.* at 61a-62a. The 1864 Treaty barred alienation of the latter lands, except with the consent of the Secretary of the Interior. *Ibid.*

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[1] The 1864 Treaty also provided for the allotment of lands to certain groups of the Ottawa, Chippewa and Pottawatomie Indians "by permission of said [Saginaw] Chippewas * * * who now reside upon said reservation in Isabella county." Article 3, 14 Stat. 657 (Pet. App. 61a).

2. The specific land at issue in this case was originally allotted to James Gruette, a Saginaw Chippewa Indian, in May of 1871 by fee patent issued pursuant to Article 2 of the Treaty of 1864, 14 Stat. 657. Pet. App. 12a.[2] In April 1987, the Saginaw Chippewa Tribe (Tribe) purchased a portion of the subject property from a non-Indian owner in an effort to reacquire the original lands of the Isabella Reservation. The Tribe owns the purchased land in unrestricted fee simple; the United States does not hold the land in trust. Prior to the Tribe's purchase of the land, Isabella County and Union Township—political subdivisions of the State of Michigan—had assessed *ad valorem* real property taxes against the non-Indian owners of the land. Pet. 9. After the Tribe acquired the property, the Tribe maintained that petitioners lacked jurisdiction to tax the real property of a federally recognized Tribe. In February 1988, the Tribe paid $1,449.37 in satisfaction of its pro rata share of the 1987 taxes levied against the property. The Tribe has not paid any subsequent taxes, protesting petitioners' assertion of jurisdiction to tax Indian-held fee lands within the boundaries of an Indian reservation. Pet. App. 11a.

Petitioners issued delinquency notices to the Tribe for real estate taxes for the years 1988, 1989 and 1990, and issued a notice of tax sale regarding the property. Pet. 9. The tax sale has been stayed by petitioners pending the outcome of this litigation.

3. In April 1991, the United States brought this action on behalf of the Secretary of the Interior for

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[2] That allotment occurred prior to enactment of the Indian General Allotment Act, also known as the Dawes Act, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. 331 *et seq.*).

the benefit of the Saginaw Chippewa Indian Tribe of Michigan for declaratory, injunctive, and monetary relief. Pet. 9-10. The complaint averred that tribally-owned fee land on the Tribe's Reservation was exempt from assessment and levy of state *ad valorem* taxes, title forfeiture proceedings, and tax sales by state and local governments.[3] The Tribe intervened as a plaintiff. In response to the complaint, petitioners not only defended their right to tax Indian-owned fee lands as a general matter, but also (1) asserted that the lands at issue here are not within the jurisdictional boundaries of the present-day Isabella Reservation, and (2) challenged the continued existence of the Saginaw Chippewa Tribe. Pet. 10.

The district court bifurcated the proceedings, requiring separate briefing of the reservation and tribal-status issues, and the *ad valorem* taxation issue. After extensive briefing by all parties on the issues of the Reservation's boundaries and the Tribe's status, the district court ordered supplemental briefing on the taxation issue. Pet. 10. In its memorandum opinion and order, the court addressed only the *ad valorem* taxation issue, declining to resolve the issues of the Reservation's boundaries and the Tribe's status. According to the district court, those issues "d[id] not affect the propriety of the *ad valorem* property taxes levied [by petitioners]." Pet. App. 14a. In the district court's view,

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[3] In an amended complaint, the United States alleged that named individual tribal members also held fee title to land that originally had been allotted pursuant to the Treaties of 1855 and 1864. The allotted land ultimately came into fee ownership of the individual members upon repurchase by those individuals.

those taxes were valid even if the land involved is within the Reservation and the Saginaw Chippewa Tribe continues to exist. *Id.* at 14a-45a.

With respect to the taxation issue, the district court noted that, in *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992), this Court "assert[ed] that 'in the area of state taxation, * * * absent cession of jurisdiction or other federal statute permitting it,' states are without power to tax 'reservation lands and reservation Indians' absent 'unmistakably clear' Congressional intent." Pet. App. 17a (quoting *Yakima*, 502 U.S. at 258). The district court expressed the view that this "*Yakima* precept" was dictum but, in any event, held that it did not apply to lands that a Tribe owned in fee simple. *Id.* at 22a-23a. The court concluded that, because the Tribe could alienate the land at issue, it is subject to state taxation. *Id.* at 26a-29a, 35a-36a.

4. The court of appeals reversed, Pet. App. 2a-10a, concluding that under *Yakima*, "a treaty provision that makes Indian land fully alienable does not, by itself, rise to the level of 'unmistakably clear' congressional intent to give states the authority to tax such alienable Indian lands," *id.* at 6a-7a. The court explained that "[t]he Supreme Court has clearly stated the rule in such cases as follows: '[A]bsent cession of jurisdiction or other federal statutes permitting it, * * * a State is without power to tax reservation lands and reservation Indians.'" *Id.* at 2a (quoting *Yakima*, 502 U.S. at 258). The court further reasoned that "Congress is not deemed to have authorized state taxation unless it has 'made its intention to do so unmistakably clear.'" *Id.* at 2a-3a (quoting *Yakima*, 502 U.S.

at 258), and it held that the authority to tax must be expressed in the patenting provision under which the land was originally allotted, *id.* at 7a-8a. The court determined that neither of the treaties under which the land at issue was allotted manifested an "unmistakably clear" intent on the part of Congress to authorize state taxation of the Tribe's land. *Id.* at 6a.

The court of appeals rejected petitioners' argument that alienability alone dictates the taxability of tribally-owned land. Pet. App. 4a. The court pointed out that petitioners based their argument primarily on a statement that the *Yakima* Court made "during its discussion of an earlier case," *Goudy* v. *Meath*, 203 U.S. 146 (1906). Pet. App. 4a. The court noted as well that petitioners "argue[] that alienability necessarily implies taxability as a general proposition, instead of recognizing that the language of * * * the General Allotment Act * * * expressly tied the two together only for purposes of the Indian lands covered in that Act." *Id.* at 6a. The court explained that "[i]n *Yakima*, the Supreme Court held that 'by specifically mentioning immunity from land taxation as one of the restrictions that would be removed upon conveyance in fee, Congress in the Burke Act proviso [to Section 6 of the Indian General Allotment Act] manifested a clear intention to permit the state to tax such Indian lands.'"[4] *Ibid.* (quoting

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[4] The Burke Act proviso, added to Section 6 of the Indian General Allotment Act in 1906, provides:

> Provided, [t]hat the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be

Yakima, 502 U.S. at 259). The court therefore concluded that "the *Yakima* decision, properly interpreted, does not alter the general rule requiring an 'unmistakably clear' expression by Congress to allow state taxation of Indian land." Pet. App. 6a.

Likewise, the court of appeals declined to follow the Ninth Circuit's decision in *Lummi Indian Tribe* v. *Whatcom County, Washington*, 5 F.3d 1355 (1993), cert. denied, 512 U.S. 1228 (1994), in which the court held that the alienable status of Indian-owned fee land is the only factor governing taxability. The court below concluded that the *Lummi* decision was inconsistent with *Yakima*'s requirement that "Congress' intent to authorize state taxation of Indians must be unmistakably clear." Pet. App. 7a (quoting *Lummi*, 5 F.3d at 1358).

The court below also rejected petitioners' argument that the allotment provisions of the Treaties of 1855 and 1864 were superseded by the later-enacted Indian General Allotment Act. The court held that nothing in the language of the Indian General Allotment Act suggests that Congress intended for the Act either to bar land allocations under treaties that pre-dated the General Allotment Act, or to alter the "substantive rights of Indian owners of property that was allocated before Congress enacted the General Allotment Act." Pet. App. 9a-10a.

Lastly, the court noted that the case could not be finally decided in light of petitioners' contentions that the land at issue was not in fact within the

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issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed.

25 U.S.C. 349.

Reservation's boundaries and that the Tribe had been dissolved and thus was no longer properly eligible for immunity from state taxation. The court "express[ed] no opinion" on those issues and remanded to the district court for further proceedings. Pet. App. 3a, 10a.

ARGUMENT

1. In *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992), this Court addressed the general taxation question raised in this case, holding that the test for whether a State may impose an *ad valorem* property tax on lands owned in fee by a Tribe or its members within the Tribe's reservation turns on congressional intent. If Congress intended in "unmistakably clear" terms to permit particular taxes, then those taxes may be assessed. The holdings of the courts of appeals in this case and in *Leech Lake Band of Chippewa Indians* v. *Cass County*, 108 F.3d 820 (8th Cir. 1997), petition and conditional cross-petition for cert. pending, Nos. 97-174 and 97-235 (filed July 8 and Aug. 7, 1997), are consistent with *Yakima*.

In *Yakima*, the Court noted that "[t]he Yakima Nation contends it is not clear whether the parcels at issue in these cases were patented under the General Allotment Act, rather than under some other statutes in force prior to the Indian Reorganization Act" of 1934, 25 U.S.C. 461 *et seq.* 502 U.S. at 270. For that reason, the Court remanded the case for the lower courts to determine as a factual matter whether the land had been patented under a different provision of law and, if so, whether a different result was required as a legal matter with respect to those lands. This Court nowhere suggested in *Yakima* that the legal

test it applied—whether there was an "unmistakably clear" intent to permit taxation—was restricted to the General Allotment Act and that a different test might be employed under another statute or treaty.

Petitioners contend (Pet. 11-13) in the alternative that the Indian General Allotment Act applies to land conveyed under treaties that pre-date the Act, and therefore authorizes the *ad valorem* taxes at issue in this case. The court below fully considered and correctly rejected that contention. The court found that nothing in the Indian General Allotment Act indicates that the "substantive provisions of the Act were intended to apply to all grants of land under any treaty." Pet. App. 9a. Moreover, as the court below determined, the Act does not even suggest that "Congress intended either to bar allocations pursuant to pre-existing treaties or to alter the substantive rights of Indian owners of property that was allocated before Congress enacted the Indian General Allotment Act." *Ibid.* Rather, the court found that, pursuant to the express language of the General Allotment Act, until the President of the United States exercises the specific land allocating authority "delegated in the [General Allotment] Act, Section 6 allowing *ad valorem* taxation is not triggered." *Ibid.*[5]

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[5] Because the court of appeals held that the alienability of lands patented pursuant to the 1864 Treaty was not sufficient to render those lands taxable if they are now owned by the Tribe or its members, the court had no occasion to consider whether lands owned by the Tribe itself within the Reservation are actually alienable under the Indian Non-Intercourse Act, 25 U.S.C. 177, and whether such lands are otherwise immune from state taxation as a general aspect of the immunity of the tribal government from the operation of state laws.

2. Petitioners urge the Court to grant review because a conflict exists between the court of appeals' decision in this case and the Ninth Circuit's decision in *Lummi* regarding what analysis to use when deciding whether a State may impose an *ad valorem* property tax on Indian-owned fee land within an Indian reservation. See Pet. 14-18. In *Lummi*, the Ninth Circuit read this Court's decision in *Yakima* to mean that, regardless of the way in which Indian-owned land was originally allotted and patented, if Congress made the land alienable, it is taxable by the state or local government. 5 F.3d at 1357.

The *Lummi* majority acknowledged that its holding was a "proposition [that] may be hard to square with the requirement, recently approved by the *Yakima Nation* Court, that Congress' intent to authorize state taxation of Indians must be unmistakably clear." *Lummi*, 5 F.3d at 1358. Indeed, the dissent in *Lummi* pointed out that "*Yakima Indian Nation* is a case of statutory interpretation which presents a detailed analysis of the language and structure of the GAA as it applies to allotments and patents issued under its particular provisions." *Id.* at 1360. Accordingly, the *Lummi* dissent expressed the view that the majority there was required "to find the unmistakably clear intent of Congress to allow taxation on these particular lands, lands which do not come under the [General Allotment Act]" but, instead, were allotted under the Treaty of Point Elliot. *Ibid.*

Lummi was the first appellate case to address the issue of state taxation of Indian-owned reservation fee lands since *Yakima*, and no other court of appeals has followed that decision. To the contrary, two federal courts of appeals and one state supreme court have held that the proper analysis for determining whether

a State may tax reservation lands that a Tribe or tribal member owns in fee is to determine if the specific patenting provision of an allotment authority (whether treaty or statute) reveals an "unmistakably clear" intent of Congress to allow such taxation. Under that analysis, those courts have rejected the contention that lands allotted and patented pursuant to authority other than the General Allotment Act were subject to state taxation. See Pet. App. 7a; *Leech Lake*, 108 F.3d at 825-826; *In re Application of Kaul*, 933 P.2d 717, 730 (Kan. 1997). Moreover, since the Ninth Circuit rendered its decision in *Lummi*, this Court, in *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450 (1995), reaffirmed that under *Yakima*, "when a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, [the Court has] employed, instead of a balancing inquiry, a 'more categorical approach: "[A]bsent cession of jurisdiction or other federal statutes permitting it," * * * a State is without power to tax *reservation lands* and reservation Indians.'" *Id.* at 458 (quoting *Yakima*, 502 U.S. at 258) (brackets and emphasis added).

Because the holding in *Lummi* is contrary to *Yakima* and to other, more recent, circuit court decisions and a state supreme court decision, it would, in our view, be appropriate to afford the Ninth Circuit an opportunity to reconsider the issue in light of those decisions and this Court's decision in *Chickasaw Nation* before the circuit conflict is deemed so irreconcilable as to warrant this Court's review.

3. If the Court determines that review of the issue raised in the certiorari petition is warranted at this time, we suggest that *Cass County* v. *Leech Lake Band of Chippewa Indians*, petition and conditional

cross-petition for cert. pending, Nos. 97-174 and 97-235, would furnish a more appropriate vehicle for doing so.

This case is in an interlocutory posture. The question presented may be of no significance in this case if, on remand, the courts below decide either of two antecedent issues in favor of petitioners: whether the subject land is located within the jurisdictional boundaries of the Isabella Reservation, and whether the Saginaw Chippewa Tribe was terminated under the provisions of the Treaty of 1855.

The reservation-boundary and tribal-status issues have remained unresolved since the United States first filed this suit. Pet. 6, 8 n.3. The district court declined to resolve those issues, in view of its conclusion that petitioners could impose an *ad valorem* property tax on the land owned by the Tribe and its members even if the land is located within the Reservation's boundaries. After reversing that holding, the court of appeals properly remanded the case for resolution of the threshold reservation-boundary and tribal-status issues. On remand, the district court will have to determine whether the present-day Isabella Reservation consists of the lands selected pursuant to the 1855 Treaty and those specifically described in the 1864 Treaty, as well as lands added to the Reservation by federal law. The district court also will have to determine the meaning and effect of the Treaty of 1855 as it pertains to the Tribe's status.[6] Because this Court does not ordinar-

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[6] With respect to the tribal-status issue, petitioners state that although the parties disagree about the significance of the fact that the descendants of the Saginaws were able to organize a tribal government under the Indian Reorganization Act, 25

ily decide issues in an interlocutory posture, plenary review is not warranted in this case. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari and stating that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court").

Leech Lake presents essentially the same issue as does this case, but not in an interlocutory posture. In *Leech Lake*, the lands at issue were allotted pursuant to the Nelson Act (Chippewa Indians of Minnesota), 25 Stat. 642, which was enacted two years after passage of the Indian General Allotment Act. Thirteen parcels were allotted under sections of the Nelson Act that specifically incorporated the General Allotment Act. *Id.* at 822. The remaining eight parcels were allotted under sections that did not incorporate the General Allotment Act and did not "include any mention of an intent to tax lands distributed under them." *Leech Lake*, 108 F.3d at 829. The issue before the court was whether the State could impose an *ad valorem* property tax on the Indian-owned fee lands within the Tribe's reservation. Thus, if the Court concludes that the question of state taxation of Indian-owned reservation fee lands presented by this case and *Leech Lake* warrants review at this time, *Leech Lake* would be a better vehicle than the instant case for resolution of that question. If the Court does grant review in *Leech Lake*, the certiorari petition in this case

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U.S.C. 461 *et seq.*, all parties, with the exception of the City of Mount Pleasant, are "generally in agreement that the Tribe does exist today by virtue of its 1937 federally approved constitution." Pet. 8 n.3.

should be held pending the Court's decision in *Leech Lake* and then be disposed of in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, if the Court grants review in *Cass County* v. *Leech Lake Band of Chippewa Indians*, petition and conditional cross-petition for cert. pending, Nos. 97-174 and 97-235, the petition in this case should be held pending the Court's decision in that case and then be disposed of as appropriate in light of that decision.

Respectfully submitted.

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